Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Space Station Licensing Rules and Policies	)	IB Docket No. 02-34
	)	

To: The Commission

PETITION FOR RECONSIDERATION AND COMMENTS OF SES AMERICOM, INC.

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SUMMARY

Critical changes to the satellite licensing framework adopted in the *Order* are needed to reflect the realities of the commercial satellite marketplace and prevent obstacles to innovation and competitive entry.

First, the Commission must eliminate the requirement for posting of a performance bond. The costs imposed by the bond requirement are substantial, and will erect a barrier to the development of new services, new orbital locations and new frequency bands. If a bond were needed to prevent speculation, there would at least be a countervailing benefit to weigh against these harms. In fact, however, the rules now contain multiple protections against the threat of frivolous license applications. These provisions render the bond requirement superfluous and remove any possible justification for retaining it.

At the very least, the Commission must attempt to minimize the most serious problems with the current bond structure by significantly reducing the initial bond amount. Requiring the posting of a multi-million dollar bond within a short time after licensing is patently unreasonable. An operator needs time once a license has been granted to finalize customer arrangements and address technical and coordination issues. To accommodate these commercial realities, the Commission should eliminate the requirement to post a multi-million dollar bond immediately after licensing (replacing it with a $500,000 "earnest money" bond), and reverse the order of the remaining bond amounts. Thus, a $1.25 million bond would be due one year after licensing, increasing up to $3.75 million due three years

after licensing. The Commission should also confirm that a decision not to proceed with a system prior to the contract execution milestone should not be counted against the licensee pursuant to the Commission's "frequent violators" provision.

Additional changes to the bond framework will also be needed if the underlying requirement is retained. First, the Commission should permit the posting of a consolidated bond if an entity holds multiple licenses. This will reduce bond costs without diminishing the bond's deterrent effects.

Second, the Commission should clarify that replacement satellites that add extended band frequencies or additional spectrum within the same band are not subject to a bond requirement. As with pure replacements, there is little or no risk of speculation when extended bands are added. Furthermore, because it is unlikely that any applicant would pursue a stand-alone system in an extended band, eliminating the bond requirement here would not harm prospective competitors.

Third, the Commission should reverse its determination that non-U.S.-licensed systems seeking U.S. market access should be subject to the same performance bond requirements as U.S. licensees. Unlike a U.S. licensee, a market access applicant obtains no unique spectrum rights, and cannot block use of an orbital location by another operator. Under these circumstances, there is no justification for imposing a performance bond.

SES AMERICOM also seeks reconsideration of other aspects of the Commission's new rules. The Commission should modify the milestone schedule adopted for GSO satellites by extending the date for completion of CDR by six

months. The Commission's schedule artificially truncates the design period and would limit licensees' ability to implement new technology and respond to changing market conditions.

The Commission also must revisit the issue of confidential treatment of satellite construction contracts. The *Order* suggests that future requests for confidential treatment will be summarily dealt with by requiring the submission of a redacted agreement. However, the Commission's obligations pursuant to FOIA require an individualized evaluation of the risks of disclosure of competitively-sensitive information. To meet these obligations the Commission must return to case-by-case consideration of confidential treatment requests.

Finally, the Commission should conform its new rule on milestone extension applications to the existing provisions of Section 25.117(e). Specifically, the Commission must confirm that milestone relief can be granted upon a showing either that delay was due to circumstances beyond the licensee's control or that public interest concerns warrant an extension.

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PETITION FOR RECONSIDERATION
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COMMENTS OF SES AMERICOM, INC.

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of the Commission's May 19, 2003 First Report and Order ("*Order*") in the above-referenced proceeding.[1] SES AMERICOM also provides comments in response to the Commission's Further Notice of Proposed Rulemaking ("*Further Notice*") in this same docket.[2]

Important revisions are needed to the Commission's new regulatory framework to ensure that the Commission's goals of promoting competition and facilitating the delivery of service to the public are met. SES AMERICOM urges the

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[1] Amendment of the Commission's Space Station Licensing Rules and Policies, IB Docket No. 02-34, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-102 (rel. May 19, 2003) ("*Order*").

[2] *Id.* at ¶ 333 *et seq.* ("*Further Notice*").

Commission to reconsider its rules by adopting the changes proposed herein. SES AMERICOM also fully concurs with positions contained in the Satellite Industry Association's ("SIA") Petition for Reconsideration and Comments being filed concurrently in this proceeding.

I. THE BOND SHOULD BE ELIMINATED, NOT INCREASED

The Commission has completely revised the process by which satellite companies obtain licenses for new satellites. These new rules, in turn, will require changes in the way that the satellite services market works – most notably in the way that operators, manufacturers and customers collectively plan and develop new systems. The market will learn to accommodate these changes in the months and years to come.

One aspect of the new rules, however, foreseeably damages the satellite market by creating an unnecessary barrier to the development of new services. The Commission has adopted a large performance bond requirement for satellite licensees and proposes to increase the bond significantly in the *Further Notice*.[3]

The Commission has failed to take into consideration the harm that the bond will do to the satellite market, both here in the United States and potentially around the world. SES AMERICOM fully appreciates the need to deter speculation in satellite licenses. As a major system operator, we would be among those most adversely affected by speculation. If performance bonds were necessary

[3] *Further Notice* at ¶ 334.

to prevent frivolous applications, we would support them. But on balance, we believe that the costs and burdens of the bond far outweigh the benefits, especially given all of the other disincentives to speculation in the current system. We strongly urge the Commission to eliminate the bond requirement, and certainly not to exacerbate the problem by increasing the bond amount.

SES AMERICOM summarizes the defects in the bond below. In addition, SES AMERICOM and other satellite operators and manufacturers are separately filing a joint petition for reconsideration seeking elimination of the bond. That petition demonstrates that the Commission lacks legal authority to impose a bond requirement and provides a more detailed explanation of the reasons why the bond is unnecessary to deter speculation and harms development of new satellite services. SES AMERICOM incorporates that petition by reference herein.

A. The Performance Bond Requirement Interferes With the Innovative Use of New Satellite Positions and Frequencies

In the *NPRM*[4] and the *Order*, the Commission recognized the satellite industry as a "crucial component" in the communications marketplace, and noted its great potential in providing a competitive alternative for the delivery of broadband services, especially for consumers in rural and underserved areas.[5] It is sadly ironic, therefore, that the Commission decided to impose a $5 million performance bond

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[4] Amendment of the Commission's Space Station Licensing Rules and Policies, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3847 (2002) ("*NPRM*").

[5] *Order* at ¶ 2; *see also* "A Perspective on the Commercial Satellite Industry," Presentation by Donald Abelson, Chief, International Bureau (Sept. 10, 2003) ("*Abelson Satellite Presentation*") at 9.

requirement for each GSO-like license. This represents a significant new regulatory compliance cost. Far from promoting the growth of the industry and its competitive potential, such an onerous requirement will act to stymie the risk-taking inherent in realizing new and innovative services, and will create significant barriers to entry by potential new competitors. Accordingly, the Commission should reconsider its decision to impose a performance bond requirement.

The bond, of course, applies only to the development of new orbital positions and frequencies.[6] As a practical matter, this means that the bond generally will apply only to situations in which an applicant is pioneering the creation of new services in less developed bands, and/or new uses of orbital locations that do not have premium CONUS coverage. The Commission presumably wants to encourage innovation in this area, not deter it.

The performance bond, however, changes the market dynamics and increases the cost structure for operators and their customers looking to innovate in the satellite arena. The process of planning, obtaining authority for, and constructing a new satellite system is a lengthy one that takes years to complete. By contrast, market demand fluctuates rapidly and technology can evolve quickly – both satellite technology, and technology of competing terrestrial systems. Demand for service that exists one year may largely evaporate by the next, based on changed economic conditions or new technology alternatives.

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[6] *See Order* at ¶ 167 (bond requirement will apply to new satellites only, not to replacement satellite licenses).

The former Commission rules accommodated this reality of innovation and market change. Satellite operators and their customers could start down the path of pioneering new orbital positions or spectrum. If the market changed, that was not a justification for milestone extensions. But nor did it lead to the imposition of multi-million dollar penalties (on top of all the other expenses of a satellite program), or "black marks" limiting the operator's flexibility to try again.

Indeed, the *Order* tends to disregard the very large costs already associated with any new satellite project, or the risks the operator assumes in even starting down the development path. In a hypothetical 18-24 month period covering initial system conception, application preparation and processing, licensing, service marketing and contract negotiation,[7] an operator might reasonably invest hundreds of thousands or even millions of dollars that will be lost should customer demand ultimately not materialize.[8] The bond requirement dramatically "ups the stakes" for any proposed new satellite system even further, by many millions of dollars (up to $25 million for a five satellite system). Thus, the amount of capital at risk could increase many times over.

To be very clear, no one should dismiss the bond amount as simply a cost of doing business that the satellite industry easily can bear. Any responsible operator, including one as large as SES AMERICOM, will have to move with

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[7] Of course, this process could take even longer than 24 months for a particularly complicated system or one involving new technologies or frequency bands.

[8] The International Bureau has expressed a new goal of six months for processing GSO applications. *See Abelson Satellite Presentation* at 12.

extreme caution in developing new orbital positions and frequencies if it could face a $5 million penalty if the project – by definition risky – proves infeasible based on further negotiations with customers or technological change. Put another way, $5 million is relatively small in the context of a total successful satellite project. But it is enormous in the context of a pioneering development project that may not come to fruition.[9] A $5 million penalty is a immediate charge on earnings that no responsible operator should have to face, lest innovation slow to a crawl.

Again, this is not an argument against milestones or other devices to prevent warehousing. Rather, it is a recognition that development of new satellite business (as opposed to replacement satellites) is already a risky, costly and lengthy process.[10] The previous system addressed the risk of speculation through the milestone process. In contrast, the new system treats every operator-developer as a potential evil "speculator," and places a sword of Damocles over every new satellite project. But an operator willing to invest in a new service concept that proves

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[9] It is important to note that bond costs, whether the costs associated with maintaining a bond or the costs of a bond forfeiture if that occurs, are not capital expenses that can be amortized and depreciated over the life of an asset. Instead, these costs are operating expenses that would be accounted for in a single year and would therefore have a much more direct and significant impact on a company's profit and loss statement.

[10] As Commissioner Copps recently noted, "the satellite business is different from the terrestrial wireless industry. Its time lines are different, challenges on funding are different, and the technology is far different. But sometimes big, long, more difficult investments yield immense value in the long run." Statement of Commissioner Michael J. Copps Regarding the Annual Report on the Commercial Satellite Industry (Sept. 10, 2003).

within a couple of years to be infeasible due to reasons beyond the operator's control is not a "speculator" and should not be punished as such. The operator should not face enormous financial penalties on top of the costs already incurred, and it should not be branded as unworthy to apply for more satellites in the future.

For that matter, compliance with the performance bond requirements would represent a significant cost for satellite licensees even in the hypothetical perfect world where bonds are never forfeited because every project runs smoothly to fruition, unaffected by market and technological change over the multi-year project life. Based on current indicators, SES AMERICOM expects that surety companies will charge yearly fees of up to three or four percent of the value of each bond for licensees with good credit. Thus, the *annual* cost of one $5 million bond could easily be $200,000. An operator with more than one license will face a much greater expense, because it will have to pay similar fees for each bond issued. It is not unusual for an operator such as SES AMERICOM to have multiple licensed-but-unbuilt satellites at any given time. Under the new limit adopted in the *Order*,[11] a licensee could, for example, face fees of $1,000,000 in one year just for its unbuilt satellites in a single frequency band.

While these added compliance costs are extremely burdensome for an established operator such as SES AMERICOM, the impact will be that much more severe on small businesses and new entrants. In addition to paying an annual fee, entities with non-investment grade credit ratings or with no credit rating can be

[11] *See Order* at ¶ 230 (limiting the number of applications or licensed-but-unbuilt satellites in any frequency band to a maximum of five).

expected to be required to reserve a substantial portion – *e.g.*, 50 to 100% – of the bond's value in an actual cash escrow account or other security acceptable to the surety company. Moreover, outstanding bonds can affect the valuation and credit rating of a company depending on the financial condition of the company, the level of the bond and the degree of collateralization.[12] Given the already challenging market for raising capital for satellite ventures, the extra capitalization required upfront, along with the bond fees, could easily result in keeping legitimate smaller and/or new applicants from bringing additional competition or new technologies and services to the satellite market.

Furthermore, the Commission's bond requirement will likely result in increased regulatory cost and business risk not only in the U.S., but in other nations as well. Foreign regulators monitor new FCC regulatory approaches, and it is not uncommon for other national regulators to adopt the Commission's practices. Thus, the Commission's decision to adopt a performance bond could well lead other countries to implement similar measures. The risk of bond proliferation is especially significant because the *Order* imposes a bond requirement not only on U.S. licensees, but also on foreign-licensed operators seeking U.S. market access.[13] Foreign regulators could easily view this as a justification for requiring U.S. licensees to post a performance bond as a condition of being granted landing rights in that country. For the reasons discussed below (*see* section III.C), SES

[12] The collateralized amount is shown on a company's balance sheet as a restricted deposit.

[13] *Order* at ¶ 309.

AMERICOM strongly opposes application of any bond requirements to foreign operators seeking the right to serve the U.S. market. However, even if the Commission revokes the bond requirement for foreign licensees, other jurisdictions may impose burdensome bond requirements of their own, multiplying the total cost impact on U.S. licensees of international satellite systems.

In short, the performance bond requirement will impose substantial additional costs and even more substantial new risks on satellite applicants. Legitimate risk-taking and innovation – the very factors that led to the development of a highly competitive industry – will be deterred, harming satellite operators and creating obstacles to the deployment of new services in response to customer demand.

B. Even Without the Bond Requirement, the *Order* Contains Sufficient Safeguards Against Speculation

As noted above, SES AMERICOM would be as adversely impacted as anyone by a system that encouraged true speculation by applicants with no serious interest in developing satellites. Our view of the bond might be different if we thought that was a serious risk. The Commission's rules, and the practical realities of the application process, however, already create a set of fences to deter bare speculation. On balance, we believe that those fences are strong enough on their own to prevent applications from parties without the means or intention to pursue them – especially when set against the problems created by the performance bond. At the least, the Commission should give those other barriers to speculation a

chance to work before moving to the more draconian performance bond system in the new rules.

First, speculation is deterred in significant measure by the sheer costs of preparing and filing a satellite application.[14] The business costs associated with an application, and the large filing fees, by themselves act as a barrier to raw speculation.

Second, the *Order* implements stricter milestone enforcement,[15] so an applicant that is not ready to proceed immediately with construction of its satellite would lose its license as soon as a milestone is missed. This increases the risk for any potential speculator by limiting the time in which it can retain a license without making a substantial financial investment. It also reduces a speculator's leverage to extract greenmail from a satellite operator. Rather than paying off a speculator, a satellite operator can simply wait until the speculator misses its milestone, knowing that it can obtain its own license quickly at that point under the new first come, first served procedures.

On top of the revocation penalty for missing a milestone for any single satellite, the Commission has also adopted additional penalties for repeated milestone violators. The punishment for being labeled a "speculator" under this provision is very severe. Specifically, if a licensee with two or more pending applications or licensed-but-unbuilt satellites misses three milestones within a

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[14] The current fee for filing a single application for a new GSO satellite is $98,645.

[15] *See, e.g., Order* at ¶¶ 6; 166-172; 197-202.

three-year period, it will not be permitted to file any more applications in any band.[16] The applicable limit on the total number of pending applications and unbuilt authorized satellites drops from *five per band* to *two in all bands*. This dramatic restriction on the number of filings an applicant can maintain provides a separate significant protection against the submission of speculative applications.

The *Order* also prohibits an applicant from selling its place in the processing queue.[17] As a result, a potential speculator could not simply file a placeholder application to obtain a position in the queue and then sell that position to the highest bidder.

Finally, the Commission's "hard look" review requires that a satellite application include all the technical and legal information required by the Commission's rules and permits summary dismissal of any non-compliant application.[18] This standard will make it more difficult for a potential speculator to prepare and file an acceptable application quickly enough to beat out other applicants in circumstances where an orbital location is relinquished or a license is revoked.

If the performance bond did not deter innovation in the satellite industry, there might be a better case for keeping it as yet one more disincentive to speculation. Once again, SES AMERICOM recognizes the potential costs to itself

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[16] *See id.* at ¶ 200.

[17] *Id.* at ¶ 240.

[18] *Id.* at ¶ 244.

and the public of warehousing by speculators. But the performance bond, especially as set forth in the rules, goes way too far in the other direction. It deters not only unjustified speculation, but also pioneering development of new satellite services by bona fide operators and their customers. SES AMERICOM respectfully requests that the Commission revise its rules to eliminate the bond.

II. IF THE PERFORMANCE BOND NEVERTHELESS IS RETAINED, THE INITIAL BOND AMOUNT MUST BE SUBSTANTIALLY REDUCED

If the Commission nevertheless decides to retain the bond and determines that it has the legal authority to do so, it must make substantial changes to the bond framework in order to reduce the negative impacts of the bond requirements on satellite industry growth and innovation. And at a minimum, it should not exacerbate the disincentive to innovate by increasing the bond amount, as contemplated by the *Further Notice*.[19]

Specifically, SES AMERICOM proposes that the Commission eliminate the initial bond requirement of $5 million due within 30 days of licensing. We suggest instead an "earnest money" bond of $500,000, due within 90 days of licensing, as a disincentive to the filing of frivolous applications. Under our proposal, a licensee would then be required to post a $1.25 million bond at the time of the contract execution milestone deadline, and the bond amount would increase over time, reaching $3.75 million at three years after licensing.

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[19] *Further Notice* at ¶ 334.

A. The Rules Create Excessive and Unreasonable Jeopardy During the First Year After Licensing

The single most significant problem with the current bond rules is the timing of the initial bond obligation. The rules expose a licensee to a potential $5 million penalty (and an associated potential "speculator" brand) beginning just 30 days after a license is issued. This situation radically changes the risk profile of satellite operators pioneering new frequencies and orbital positions. It ignores the commercial realities involved in developing new satellite business, and it perversely imposes the greatest penalty exposure on those who hold licenses for the least amount of time. If the Commission is going to retain the bond, it at least must address this fundamental flaw by substantially reducing the exposure of licensees during the first year before a construction contract is required.

More specifically, the new rules ignore the "chicken and egg" dilemma inherent in developing new satellites in new bands and orbital positions. As discussed above, these projects are inherently risky, involving technological and market uncertainties. They do not permit a "Field of Dreams" approach – "build it and they will come." Rather, new satellite development projects require risk-sharing and risk-spreading among the operator, major customers, and the manufacturer. In planning a new satellite system, operators typically work closely with key prospective customers (including one or more "anchor tenants") in advance of filing an application. However, customers are seldom willing to make final commitments until they are assured that an operator has a license. Even once a license is granted, prospective customers often require further time to finalize their

own business plans and secure approval for necessary financial commitments, and further design modifications may be needed to respond to customer requirements. Similarly, the operator will address technological issues and risks with manufacturers in the context of an approved license for a particular spacecraft. These matters are typically resolved by the time the operator enters into its construction contract. By that point, it has finalized contractual arrangements with key customers and the chosen manufacturer that permit it to reduce its risk to an acceptable level. However, prior to that time, a licensee cannot be confident that its business plan will be successful.

As a practical matter, the prior regulatory framework accommodated these market realities by permitting a licensee to abandon its system without further penalty if market changes prevented successful development of the proposed system.[20] Although the framework did not permit market developments to justify milestone extensions, it did permit the operator a reasonable amount of time in which to finalize the marketing of its new services (*i.e.*, obtain signed contracts), without incurring a draconian penalty if the target customers ultimately failed to commit. Moreover, the old framework provided new licensees with the time needed to evaluate international coordination and ITU priority issues and time to consider any FCC conditions placed on the license as granted that might adversely affect the applicant's business plan.

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[20] The applicant was required to have the financial ability to pursue its proposed satellite, and a good faith intention to do so. But the applicant's risk was its costs to pursue the project, and the loss of its license if it did not.

The new performance bond rules, however, upset the apple cart. They immediately expose the operator to enormous penalties if a project does not come to pass. Ironically, the penalty is most severe for the period when the project is most fluid, the period prior to execution of the construction contract.[21] Under the new framework, the immediate post-licensing period will be particularly critical for the expansion satellites to which the new bond requirement applies. These satellites will generally be developed to meet new business plans and implement developing technology, rather than providing services comparable to what the operator already offers. Given that "core" orbital locations in established bands are largely occupied, operators will need to offer – using new spectrum and from less-advantageous orbital positions – innovative services tailored to individual customers. As a result, the services developed are unlikely to be easily fungible, commodity-type offerings, making them more complicated to market.

The requirement to post a multi-million dollar bond shortly after licensing does not provide an adequate opportunity for a licensee and its customers to solidify business plans before committing substantial funds to a project. Nor is

[21] The new rules also change the market dynamic in another way that is relevant here. The first come, first served system will make it harder to market a potential service prior to filing an application, given the emphasis the new process places on confidentiality. Obviously, the more potential customers with which an operator discusses a new service concept, the greater the chances that a competitor will learn of the operator's plans and rush to file an application that would thwart the operator's ability to do so. Although non-disclosure agreements are used, it can be impossible to trace the source of a "leak" to a competitor when various potential customers have been approached. Thus, under the FCFS system, an operator will have an incentive to file an application first and then finish negotiations with customers for the new service after its place in the queue is secured. However, this will leave the operator with only several months before the bond is due.

there an opportunity for coordination and other technical issues to be addressed. The bond puts a new burden on satellite licensees that will make it much harder to get new projects off the ground.

B. A "Ramp Up" Approach Would More Rationally Accommodate Commercial Needs While Still Protecting Against Speculation

By adjusting the bond framework, the Commission can better accommodate the commercial and technical concerns discussed above. Currently, the rules require the posting of a $5 million bond within 30 days of a license grant.[22] The bond is then reduced by $1.25 million as each milestone is achieved, to $3.75 million at execution of a non-contingent contract, $2.5 million at completion of CDR, and $1.25 million at commencement of physical construction.

If the Commission retains a bond requirement, it at least must modify this framework. Specifically, SES AMERICOM proposes that the Commission:

1. Eliminate the requirement to post a multi-million dollar bond immediately after licensing, and instead require a $500,000 bond due 90 days after licensing.

2. Retain the general timing of the additional bond postings, but reverse the order of the bond amounts. Thus, licensees would be required to post a $1.25 million bond one year after licensing (the contract execution milestone deadline), a $2.5 million bond at two years after licensing (the CDR milestone deadline),[23] and a $3.75 million bond at three years after licensing (the commencement of physical construction milestone deadline).

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[22] *See* 47 C.F.R. § 25.149.

[23] If the Commission adopts SES AMERICOM's proposal to extend the CDR completion milestone date by six months, this bond would be due at two and a half years after licensing. See *infra* section IV.

3. Confirm that a decision to relinquish a license prior to the contract execution milestone should not be counted against the operator under the Commission's "frequent violators" provision.[24]

As explained above, the requirement to post a $5 million bond immediately after licensing is fundamentally inconsistent with satellite market realities and would discourage new services and innovations. However, a $500,000 "earnest money" bond, payable at 90 days after licensing, would be a more acceptable burden on legitimate licensees, while still deterring the filing of truly speculative applications by entities with no intention to proceed. This is a sufficiently large hurdle, on top of the $100,000 application fee and the large costs of preparing and prosecuting an application, to deter frivolous applications.

For the remaining three milestones deadlines, the bond amounts are increased, rather than decreased, as time moves forward. This better addresses the Commission's fundamental policy concern that spectrum not lie fallow, by adjusting the size of the penalty to be commensurate with the length of the time the spectrum is unavailable for other users. Thus, the longer the spectrum is tied up without ultimately being put to productive use, the larger the risk to the licensee will be. The bond postings are due on the milestone deadline dates, rather than at the time of actual completion of the milestones, to avoid any perverse incentive for a licensee to postpone satisfying a milestone ahead of schedule.

This revised framework is superior to the current rules. It encourages innovation by giving legitimate applicants that have developed new offerings a post-

[24] *See Order* at ¶ 200.

license period during which to work with customers, address international spectrum rights and resolve any technical obstacles to their proposed services. At the same time, the proposal provides a mechanism for weeding out frivolous applicants by imposing a significant earnest money bond shortly after licensing, in addition to the costs for preparing and filing an application. The Commission also retains the ability to reclaim licenses quickly, permitting timely reassignment of spectrum/orbital resources. As a result, the proposal strikes the appropriate balance between the need to deter frivolous filings and the need to permit serious applicants the necessary time to develop their business plans without facing excessive penalties.

III. OTHER CHANGES IN THE BOND FRAMEWORK ARE NEEDED IF THE BOND IS RETAINED

In addition, the Commission must correct other flaws in the bond framework if the bond requirement is retained. Specifically, the Commission should permit the posting of a consolidated bond if a licensee has multiple unlaunched spacecraft. The Commission should also make clear that the bond requirement does not apply to replacement applicants seeking to add extended bands or to non-U.S.-licensed operators seeking U.S. market access.

A. The Commission Should Permit Operators to Post a Consolidated Bond to Cover Multiple Unbuilt Satellites

To the extent the Commission decides to maintain a bond requirement, it could significantly reduce the burden it imposes on licensees – without diminishing the bond's deterrent effects – by permitting operators to maintain a

single consolidated bond to cover multiple satellite licenses. Pursuant to the new rules, any individual applicant may have up to five licenses for unbuilt spacecraft in any given satellite band.[25] Under current bond procedures, a licensee would have to post a separate bond for each license. As discussed in section I, the annual fees to maintain multiple bonds will be substantial, even for large operators.[26]

To reduce redundant regulatory compliance costs, SES AMERICOM proposes that licensees of multiple spacecraft should have the option of maintaining a consolidated bond to cover all unbuilt satellites. The amount of the bond should be capped at the maximum single bond level (*i.e.,* $5 million under the current rules or $3.75 million under the revised plan discussed in section II above). If a licensee's total bond liability for all its unbuilt spacecraft goes below the maximum single bond level, the licensee should be permitted to decrease the consolidated bond to that amount. In the event that a license is relinquished (or revoked) and a bond forfeiture results, the licensee should be required to replenish the bond to the appropriate level within 60 days. A failure to replenish the bond as required should result in cancellation of any remaining licenses for unbuilt spacecraft.

The rule revisions SES AMERICOM is proposing can best be illustrated by an example: suppose that Acme Satellite Company has licenses for four unbuilt spacecraft. Satellite A is soon to be launched, satellites B and C have completed CDR, and satellite D is under contract. Acme's total bond liability (under

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[25] 47 C.F.R. § 25.159.

[26] For example, the bond fees required for a five-satellite system could easily add $1 million to the operator's regulatory compliance expense in the first year.

the alternative proposal described in section II.B above)[27] would be $10 million ($3.75M for A, $2.5M each for B and C, and $1.25M for D). If the changes proposed by SES AMERICOM are adopted, Acme would be permitted to maintain a single bond of $3.75 million (the maximum single bond amount under SES AMERICOM's proposal discussed in section II). If Acme fails to commence physical construction of satellite B by the applicable milestone date, $2.5 million of the bond would be subject to forfeiture. Acme would then have 60 days to replenish the bond to the $3.75 million level. If it fails to do so, the Commission could revoke any or all of its remaining licenses. Assuming Acme does replenish its bond, it would be required to continue to maintain a $3.75 million bond until its total bond liability goes below $3.75 million.

The consolidated bond approach has substantial advantages. An operator with multiple licenses for unbuilt satellites will be able to save significantly on bond costs. As discussed above, for licensees with good credit ratings, these costs are expected to be on the order of up to three or four percent of the total bond amount per year. Bond fees represent an additional cost of doing business for satellite operators that ultimately will be borne by satellite users. The payment of the annual bond fees benefits no one but the surety company. Reduction of these costs removes an unnecessary burden on operators, without adversely affecting an operator's incentives to proceed with system construction.

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[27] SES AMERICOM emphasizes, however, that the most prudent action would be to eliminate the bond entirely, as explained in section I.

In addition to lowering costs, the consolidated bond approach also decreases administrative burdens by permitting a licensee to maintain a single bond. Significantly, permitting bond consolidation will not detract from the deterrent effect of the performance bond. In order to maintain its licenses, an operator will need to replenish the bond as necessary after any forfeiture or risk losing its other licenses.

The Commission may need to consider whether new entrants with no operational spacecraft should be eligible for bond consolidation. If such an entity obtained multiple licenses and then failed to proceed with any of them, it might be difficult for the Commission to enforce the requirement that the defaulting licensee pay the appropriate forfeiture amount for each license. Such a scenario may justify limiting the applicability of the consolidated bond option to operators over whom the Commission would continue to have jurisdiction even if they relinquished all licenses for unbuilt spacecraft.

B. Replacement Satellites that Add New Extended Bands Should Not Be Subject to a Performance Bond

If the Commission retains a bond requirement, it must also clarify its policies with respect to replacement spacecraft. In the *Order*, the Commission determined that it would *not* apply the performance bond requirement to replacement satellites, correctly reasoning that "[o]nce a licensee has begun to provide service, we are confident that its replacement satellite application will be

intended to continue service, and would not be filed for speculative purposes."[28] The Commission did not, however, specifically indicate that the bond exemption would apply equally to replacement satellites when an applicant seeks and obtains authority to add new extended band frequencies or additional spectrum within the same band. SES AMERICOM agrees with SIA that on reconsideration, the Commission should clarify that *all* replacement satellites, including those that add extended band spectrum or additional spectrum within the same band, are exempt from any bond requirement.[29]

An operator seeking to replace a satellite to continue and enhance its services from its assigned orbital location is unlikely to be seeking to add spectrum within the band or in the extended band for speculative reasons. Clearly, given its existing customer base, the licensee has an adequate incentive to complete construction of the satellite. Similarly, there is little reason the licensee wouldn't also add the extended C- and/or extended Ku-band capacity it requested. Thus, the same rationale that led the Commission to exempt replacement satellites from the bond requirement supports extending that exemption to replacement satellites with extended bands.[30]

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[28] *Order* at ¶ 167.

[29] As SIA's Petition indicates, the Commission should also amend new Section 25.149 to conform with the text of the *Order*. Currently, in what is presumably a drafting oversight, Section 25.149 does not reflect the Commission's clear decision to exempt replacement satellites from the bond requirement.

[30] For the same reasons, an application by a Ka-band licensee to launch a replacement satellite that uses Ka-band spectrum not deployed on the spacecraft being replaced should also be exempt from any performance bond requirement.

Moreover, the lack of a bond requirement in this circumstance will not disadvantage potential competitors. Due to the limited bandwidth and restrictions on the use of the spectrum, it is unlikely that a competitor would propose a "stand alone" system in either the extended C-band or the extended Ku-band. In fact, to SES AMERICOM's knowledge, no extended-band-only spacecraft has ever been constructed and launched. Thus, a bond requirement would only add bond maintenance fee costs (ultimately borne by customers) to the construction of the replacement satellite without achieving any public policy objective.

To the contrary, imposition of a performance bond in such situations would unnecessarily chill the development of services in the extended bands. As noted above, because of their limited bandwidth and current restrictions on their use, the extended bands are less valuable to an operator than conventional bands. The burden of a performance bond will reduce this value further. By changing the cost/benefit ratio of adding extended band service, a bond will create disincentives for the deployment of extended bands. Imposition of a bond requirement would therefore disserve the Commission's goal of promoting the efficient use of spectrum.

C. Non-U.S.-Licensed Operators Seeking U.S. Market Access Should Not Have to Post a Performance Bond

The *Order* requires that non-US. licensed operators seeking U.S. market access comply with the same performance bond requirements that apply to U.S. licensees.[31] SES AMERICOM, along with SIA, urges the Commission to

[31] *See Order* at ¶¶ 308-313.

reconsider this decision with regard to GSO-like systems seeking U.S. market access.

Consistent with Commission policies, a system seeking to provide future U.S. services pursuant to a non-U.S. license should not block interim use of the orbital location by another satellite.[32] Under these circumstances, granting U.S. market access creates no risk that a non-U.S. licensee could warehouse spectrum to the detriment of other operators, and there is no possible justification for a bond requirement.

Furthermore, by placing a bond requirement on non-US. operators, the Commission could trigger a worldwide proliferation of similar requirements placed on U.S. operators seeking landing rights in other countries. Faced with multiple millions of dollars in annual bond fees and tens or hundreds of millions in potential non-compliance liability, U.S. satellite operators would be forced to seriously curtail or cease expansion. Deployment of a global satellite system designed to provide worldwide communications would simply be infeasible.[33]

The Commission has no obligation under WTO commitments to impose such "equal" treatment on non-US. licensees. Moreover, the Commission has not explained the basis of its jurisdiction over non-US. space station *implementation* requirements, a matter ordinarily under the exclusive jurisdiction of the national licensing authority. Given the absence of any preclusive effect of a foreign market

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[32] *Id.* at ¶ 296.

[33] Foreign regulators might also seek to place financial obligations on operators in other satellite services, such as GPS.

access filing, the Commission should exempt such applicants from any bond requirements.

IV. THE COMMISSION SHOULD EXTEND THE CDR MILESTONE BY SIX MONTHS

SES AMERICOM also strongly supports SIA's proposal for a six-month extension of the Critical Design Review ("CDR") milestone. As SIA explains, an extension of the CDR milestone will result in a more realistically achievable schedule for satellite licensees and one that provides for more logical spacing between the CDR milestone and the date for commencement of physical construction for GSO satellites.

Under the schedule adopted in the *Order*, the CDR deadline is two years after the license is issued – one year following the milestone for execution of a noncontingent satellite construction contract. SES AMERICOM agrees with SIA that completing CDR within a year of executing a contract will not always be possible, particularly in cases where the satellite design is especially complicated or market conditions are fluctuating. In fact, a review of SES AMERICOM's most recent satellite construction projects indicates that the period between contract execution and CDR is typically thirteen months or more.[34]

The CDR date represents an important point in the development of a new spacecraft. As the *Order* recognizes, CDR marks the completion of the design

[34] For example, the period between contract execution and CDR was thirteen months for the AMC-10 and 11 C-band replacement satellites and nineteen months for AMC-12, a large-capacity C-band spacecraft that uses a new spacecraft bus design.

phase and the commencement of the manufacturing stage.[35] After CDR, the manufacturer releases specifications of the satellite to subcontractors and begins construction of any elements being built in-house. As a result, any change in the satellite is much more difficult and expensive if it is proposed following the CDR date.

It is essential that the CDR milestone not be set artificially early. First, rushing through the design process to meet an external CDR deadline is not simply a matter of inconvenience to satellite operators and manufacturers. Mission-critical decisions must be made during this process that will ultimately affect the spacecraft's performance and longevity. Unnecessarily constraining the time available for these essential processes could adversely affect a system's quality and reliability, with serious consequences for both the operator and the customers of the satellite.

Furthermore, because the technical specifications of the satellite are essentially "frozen" at the CDR date, a licensee cannot make changes to take advantage of newly developed technology or to respond to newly identified customer demand after CDR has occurred. As a result, a CDR date that is too early will deprive the satellite licensee of needed flexibility.

For example, SES AMERICOM insists that all elements of its satellites be flight-qualified equipment. SES AMERICOM might be interested in using a newly-developed component on a spacecraft being built, but would not do so

[35] *Order* at ¶ 191.

until flight qualification has been completed. If the element is being tested as part of another program and becomes qualified prior to the CDR date for SES AMERICOM's new spacecraft, SES AMERICOM would then be able to take advantage of the new technology without undue risk. However, if the element only becomes flight-qualified after the SES AMERICOM spacecraft's CDR date, the opportunity to use the new technology would be lost. Having a CDR date that occurs eighteen months rather than a year after contract execution thus can make it possible to use the most state-of-the-art equipment on a new spacecraft.

Similar difficulties can arise with respect to tailoring a spacecraft design to respond to market forces. Satellite operators already face substantial risk from the long lead times required to construct and launch a satellite. It is very difficult to predict years in advance the types of configurations that will best respond to projected customer demand, especially when an operator is deploying a spacecraft to a new orbital position or in a new frequency band. An operator must retain the ability to tailor its system to changing market forces during the time after a contract is executed but before physical construction has begun. If a satellite's capabilities are prematurely frozen because of an artificial CDR deadline that could well be fatal for the ultimate success of a satellite project.[36]

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[36] Satellite licensees will not necessarily require the extra time to complete CDR in all cases. For example, if a licensee is building a straightforward replacement satellite in an established band, it may have a high level of confidence regarding technical and market factors and be in a position to finalize its design and proceed with construction more quickly. Of course, nothing in the Commission's milestone rules would prevent a licensee from pursuing a more accelerated schedule and completing tasks in advance of the milestone dates. However, the Commission's

By extending the CDR milestone date by six months, the Commission can accommodate these technical and business realities. Furthermore, the proposed change will produce an overall milestone schedule that is more logical. As noted above, CDR is typically viewed as the date after which construction of the satellite can begin. However, under the current rules, the CDR date for GSO systems is a full year before the deadline for commencement of physical construction. It makes no sense to have a gap of this size between these two milestones. Once CDR occurs, there may be some delay before construction can start, as the prime contractor will need to communicate with the subcontractors concerning the final satellite specifications. Six months, however, should be sufficient for this purpose.

This proposed change in the overall milestone schedule for GSOs will serve the public interest by giving satellite licensees necessary flexibility to implement new technologies and respond to customer demand. At the same time, it will not detract from the purpose of the milestone schedule, which is to protect against warehousing by ensuring that licensees make regular progress toward completion of their spacecraft. In fact, the revised schedule is more consistent with that goal because it eliminates unneeded lag time between the CDR and commencement of physical construction milestone dates. Accordingly, the Commission should modify the GSO milestones adopted in the *Order* by requiring completion of CDR two and a half years, rather than two years, following a license grant.

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milestone schedule must be set with dates that are also reasonably achievable for more technically complicated satellites and satellites addressing new markets.

V. THE COMMISSION SHOULD RETURN TO A CASE-BY-CASE APPROACH TO REQUESTS FOR CONFIDENTIAL TREATMENT OF SATELLITE CONTRACT INFORMATION

SES AMERICOM joins with SIA in petitioning for reconsideration of the *Order*'s apparent change in the Commission's policy and procedures regarding the confidentiality of satellite construction contracts. The *Order* indicates that licensees seeking confidential treatment of a contract will be required to file a redacted copy of the contract at the time of filing, regardless of whether any other party is seeking access to the contract, and will have no opportunity to object to disclosure of the redacted agreement.[37] This is a sharp departure from current practice, which permits a licensee to oppose any request for disclosure of confidential contract documents and to seek appropriate protections to minimize any competitive harm that could result from such disclosure.

As SIA explains in its Petition, the proposed changes conflict with the requirement under the Freedom of Information Act (FOIA) to protect competitively-sensitive information from disclosure. In addition, SIA demonstrates that the new procedures would harm satellite operators and manufacturers, reduce incentives for innovation, and create added administrative burdens for Commission staff.

The Commission has previously determined that it is obligated to ensure that it does not unnecessarily disclose information that might place a

[37] *See Order* at ¶ 187. Furthermore, the *Order* suggests that redactions will only be permitted for pricing and certain technical information. *Id.*

regulated entity at a competitive disadvantage.[38] SES AMERICOM is well aware of the competitive risks posed when third parties request access to a satellite construction contract that contains proprietary commercial information.

In 2000, the Commission required the submission of a confidential construction contract and related documents regarding the GE*Star Ka-band system. SES AMERICOM (which was then known as GE Americom) submitted the documents as required, but requested confidential treatment to protect the competitively-sensitive information from disclosure. Subsequently, two parties filed requests pursuant to FOIA seeking access to the documents.

SES AMERICOM objected to disclosure because the documents sought reflected the company's Ka-band deployment plans and assumptions regarding the Ka-band market, as well as proprietary technical information. Disclosure of this information would have allowed SES AMERICOM's competitors to tailor their own plans to counter SES AMERICOM's business strategy.

SES AMERICOM also explained that the documents contained terms and conditions common to the company's procurements of other satellites. Disclosure of detailed information regarding these provisions thus could have impaired the company's ability to achieve favorable terms and conditions in future satellite construction contracts and/or could have enabled competitors to obtain

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[38] *See, e.g.,* Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816, 24822 (1998).

similarly favorable terms, thereby depriving SES AMERICOM of the benefits of its bargain.

Commission staff considered these arguments and determined that the information in the documents "warrants confidential treatment because disclosure would give competitors access to . . . Americom's Ka-band business plan and detailed specifications for its Ka-band satellites."[39] The documents were then provided to the petitioners subject to a protective order designed to reduce the risk of competitive harm to SES AMERICOM.

Importantly, the Commission's procedures permitted it to determine how to best balance AMERICOM's interests in protection of its proprietary documents against the FOIA petitioners' interests in access to the information.[40] This determination was made based on an analysis of the specific facts before the Commission. Thus, the Commission was able to satisfy its obligation under its own rules implementing FOIA, which state that it will weigh the "considerations favoring disclosure and non-disclosure . . . in light of the facts presented."[41]

The Commission must return to this case-by-case approach in order to adequately protect confidential information in satellite construction contracts. The

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[39] *See* Letter of Donald Abelson, Chief, International Bureau, to Peter Rohrbach, Counsel to GE Americom (Dec. 1, 2000) at 2.

[40] The SIA Petition provides numerous other examples of Commission determinations pursuant to FOIA regarding the protection of competitively-sensitive information in satellite construction contracts and other proprietary documents.

[41] 47 C.F.R. § 0.461(f)(4).

Order provides no basis for any change in this policy, and no explanation regarding how the new process will shield licensees from competitive harm. The Commission should reconsider its decision and return to its prior procedures for considering requests for confidential treatment of satellite construction contracts.

VI. THE COMMISSION SHOULD CLARIFY ITS RULES ON MILESTONE EXTENSIONS AS REQUESTED BY SIA

As modified by the *Order*, Section 25.161(a) of the Commission's rules states that space station licenses will be terminated for a licensee's failure to meet a milestone, unless the failure was caused by "circumstances beyond the licensee's control."[42] By establishing the "beyond its control" standard as the only exception to license termination, Section 25.161(a) conflicts with both existing precedent and with Section 25.117(e), which provides that milestone extensions may also be obtained if "there are unique and overriding public interest concerns that justify an extension."[43] The Commission did not explain in the *Order* its omission of a public interest rationale for milestone extensions, or how it would reconcile the new rule with Section 25.117(e). SES AMERICOM believes the Commission should preserve its flexibility to grant milestone extensions for public interest reasons, and joins

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[42] 47 C.F.R. § 25.161(a).

[43] 47 C.F.R. § 25.117(e). Adding to the confusion and internal inconsistency is new Section 25.149(c) governing performance bonds, which states that a licensee will be considered in default if it fails to meet any milestone and "has not provided a sufficient basis for extending the milestone." It is not clear whether the "sufficient basis" would be determined based on Section 25.117(e) or Section 25.161(a).

with SIA in requesting that, on reconsideration, the Commission modify Section 25.161(a) to make it consistent with Section 25.117(e).

CONCLUSION

For the reasons set forth herein, SES AMERICOM requests that the Commission reconsider the rules and policies adopted in the *Order*. Revision of the Commission's framework as SES AMERICOM has recommended will serve the public interest by removing unnecessary barriers to innovation, enhancing competition, and promoting efficient use of satellite spectrum.

Respectfully submitted,

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